

No. 84044-0

SUPREME COURT OF THE STATE OF WASHINGTON

BANK OF AMERICA, N.A., a national association,

Petitioner,

v.

KENNETH TREIGER,
a married person as to his separate estate,

Respondent,

J'AMY LYN OWENS, an unmarried person, SHULKIN, HUTTON,
INC., P.S., a Washington professional service corporation;
and EDMUND JOHN WOOD,

Defendants.

AMICUS CURIAE BRIEF OF WASHINGTON LAND TITLE
ASSOCIATION IN SUPPORT OF REVERSAL
OF THE COURT OF APPEALS' DECISION

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I. IDENTITY OF *AMICUS CURIAE*

The Washington Land Title Association ("WLTA") is a non-profit corporation formed in 1905. Its members include national title insurance underwriters, independent agents and professionals in related fields, such as the practice of law. The WLTA's purpose is to promote high quality land title evidencing and title insurance services. This industry organization advocates sound and ethical business practices, provides educational opportunities in numerous areas of title evidencing and insurance, and facilitates effective communication within the industry and with the public. The comparable national organization, to which many if not most of the WLTA members belong, is the American Land Title Association. The WLTA participates as an industry in the appellate process when a matter is of significance to the overall stability of land titles in the State of Washington. This is such a case.

II. ARGUMENT IN SUPPORT OF REVERSAL OF THE COURT OF APPEALS' DECISION

A. Perfection of a Judgment *Lien* Requires More than Recording with a County Auditor or Filing with a Court.

The Court of Appeals' decision erroneously conflates the concept of constructive notice with the creation of a judgment lien. The decision should be reversed not only because it is based on flawed legal analysis

but because, if it stands, it will increase the risk of insuring real estate titles and thus the cost of real estate transactions.

When title insurers search public records for liens against real property, they look in two places: the county auditor's office, and the county clerk's execution docket in the county where the subject property is located. The county clerk's execution docket is supposed to be, and needs to be, a reliably complete repository of those court-generated judgments that create enforceable liens against real property. Anyone can record a document to provide constructive notice of an interest claimed in or with respect to real property, but no one is required to record a judgment with the county auditor's office in order to create a judgment lien. Therefore, proper notice and the ability to search an identifiable county clerk's execution docket record is of paramount importance.

By statute, for a judgment to be effective it must contain a judgment summary and "[t]he clerk may not enter a judgment, and a judgment does not take effect, until the judgment has a summary in compliance with this section." RCW 4.64.030(3). In this case, Mr. Treiger's claim to a share of proceeds from the sale of Ms. Owens' house was reflected in document 1376, which, even if it constitutes a "judgment" for *finality* purposes, is not effective as a judgment *lien* because it does not contain the statutorily required summary and is not entered on the county

clerk's execution docket. Even if Mr. Treiger's recording of document 1376 in the county auditor's file gave constructive notice of the document, recording did not elevate the document to the status of an effective *judgment lien* against real property. Giving notice of a document does not equate to the creation of a lien. Because the Court of Appeals used "notice" analysis to excuse the failure by Mr. Treiger to establish an effective judgment lien, its decision is erroneous and should be reversed.

B. The Court of Appeals' Decision, Unless Reversed, Will Make Insuring Title Riskier to Insurers More Expensive to Owners (and Lenders and Sellers) of Real Property, and less Available.

The decision should be reversed because its erroneous implications reach beyond the context of the dispute between Mr. Treiger and Bank of America.

The Court of Appeals' decision puts a title examiner in the position of having to find the proverbial "needle in a haystack" and correctly interpret it whenever a title is searched. Any order in any file in any courthouse could reflect a perfected judgment lien, whether or not it is entered on the county clerk's execution docket. The Court of Appeals' decision compels title insurers, in effect, to choose between accepting substantially more risk or refusing to issue title policies. If title insurers accept substantially higher risks, the cost of title insurance policies – to buyers of homes as well as of skyscrapers – will likewise increase, and

probably substantially. Title insurance coverage will also become less available, which can serve only to reduce liquidity in our state economy.

If the Court of Appeals' ruling is allowed to stand, it will weigh heavily on the public's ability to conduct real estate transactions, because title companies will not have a reliably inclusive public record to search for judgment liens that affect title to real property. Before the Court of Appeals' decision, the county clerk's execution docket served, by operation of RCW 4.64.030 and as a matter of industry practice, as the reliable public record that title companies searched to find judgments that created liens on real property. The Court of Appeals' decision has the effect of requiring title insurers to change that practice and seek out, examine, and interpret every order and decree on file in every courthouse, even those that are not entered on the county clerk's execution docket. With such an unreliable, even random, public record, a title insurer cannot evaluate the risk it is asked to accept when insuring title to real property, and this inability will have an immediate effect on the overall willingness of the insurer to agree to accept an unknown risk and the premiums that will be charged to buyers, sellers and lenders if that risk is accepted.

Title insurance companies are in the business of assessing and accepting (or refusing to accept) risks associated with titles to real property. Accurately identifying risks in connection with a real property

transaction is an important public benefit, because few people can afford to buy homes or other types of real property without borrowing money for at least a portion of the purchase price, and lenders are not willing or able to make loans unless the validity, enforceability, and priority of security interests are insured against defects, liens, encumbrances or other adverse matters (and some lenders also insist that the owner obtain title insurance as well). If a title company accepts a particular risk associated with a land title, it charges a premium based on rates filed with the Office of the Insurance Commissioner. Premium rates are based on the dollar amount of insurance stated in the title policy, which includes consideration of the resources necessary to produce the policy and the risk associated with a particular form of coverage. Each title underwriter must make a decision about a particular risk associated with any given pending real property transaction. The greater the risk, the less willing title insurers are to accept that risk and issue a title insurance policy; and the more difficult it becomes for a prospective purchaser or lender to obtain the requisite coverage and complete a real estate transaction.

Thus, uncertainties and shortcomings in the public records relating to land titles increase the risks and costs associated with obtaining title insurance. Not only are such costs reflected in the premiums charged for title insurance policies, but unnecessary or unreasonable risks may make

certain coverages unavailable at all. That could prevent certain real estate markets from functioning. If title insurers must now consider that any order on file in any courthouse may create a valid and perfected judgment lien on real property of which they are charged with notice, that will have substantial implications for how title companies evaluate risk in the markets they facilitate.

It is not exaggerating to say that, ultimately, the legal, political, business and practical issues this case presents have significant implications for how readily homes (as well as other kinds of real property) can be bought, sold, and financed throughout our state every day. Title insurance underwriters must be able to rely on a stable and inclusive public record to search for judgment liens against real property, or they will decline to accept certain risks. And, unless the title insurance process functions predictably, a financial sector that currently is already reluctant could be even more hesitant to make the loans necessary to reverse the real estate trends of the last few years. It is not an overstatement to say that without the members of the WLTA doing what they do every day, delivering the services that are challenged by the Court of Appeals' decision in this case, a recovery in the real estate market will be slower and more prolonged.

The WTLA's position is that the plain language of RCW 4.56.190 and RCW 4.64.030 give judgment lien effect only to those documents that contain the required Judgment Summary and are entered on the execution docket. The proper application of the statute ensures that the public record will be inclusive and reliable when title insurance underwriters or members of the public search for judgment liens. The WTLA asks the Supreme Court to confirm and reestablish the requirements prescribed by the legislature for perfecting a judgment lien, and creating and maintaining a reliable, inclusive execution docket, based upon which it is fair to charge someone with notice of a judgment *lien* against real property.

Even if recording with the county auditor gave the bank in this case constructive notice of Mr. Treiger's interest in sale proceeds, the Court of Appeals went too far in concluding that what he recorded gave the bank, or anyone, notice that Treiger had *a valid and perfected judgment lien* with respect to the real property. For Mr. Treiger to have had a valid and perfected judgment lien, there had to be a judgment, with a judgment summary, on the county clerk's execution docket.

III. CONCLUSION

The WTLA asks the Supreme Court to reverse the Court of Appeals and hold that Kenneth Treiger never perfected a judgment lien against the proceeds of sale of Ms. Owens' house.

RESPECTFULLY SUBMITTED this 10th day of December, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of December, 2010, I caused a true and correct copy of the foregoing document, "*Amicus Curiae* Brief of Washington Land Title Association in Support of Reversal of the Court of Appeals' Decision" to be delivered via e-mail and U.S. Mail, postage prepaid, to the following counsel of record:

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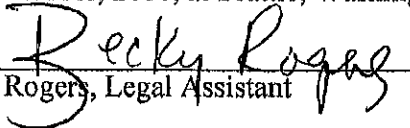
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